a term in the face of the express and clear provisions of the contract in clause 29(b) and Note 5 of the Specifications. The arbitrator should only have implied a term that the P.W.D. should clear the obstruction within a reasonable time and proceed with his findings on that basis. The arbitrator was justified only in implying in the contract these terms which in fact were contained in the letters exchanged by the parties prior to the signing of the formal contract namely (1) that the P.W.D. should clear the obstruction as quickly as possible and (2) that an adequate extension to completion date should be given to the claimant. The arbitrator should have admitted the said correspondence as forming a collateral contract and held that there was such a collateral contract. Had the arbitrator acted correctly in these two respects he would not have held that the P.W.D. was in breach let alone in fundamental breach.

In my opinion the arbitrator was correct in his view that the evidence of pre-contract negotiations and statements made by or on behalf of either party and not being within the contract documents is inadmissible under section 92 of the Evidence Act to contradict, vary, add to or subtract from the terms of the contract.

In my view the arbitrator has not implied a term in the contract which is completely unwarranted. On the facts found by the arbitrator it was open to the arbitrator to find (which he did) that the P.W.D. had committed a fundamental or repudiatory breach. The P.W.D. had by their breach "produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made", (*per* Lord Reid in *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*).

The next point taken by the respondent is that the arbitrator had misstated the law that "it is well established that a party who is in fundamental breach cannot rely on exceptions or protecting provisions in a contract."

In the *Suisse Atlantique* case Lord Reid said (at page 398):

"I do not think that there is generally much difficulty where the innocent party has elected to treat the breach (fundamental breach) as a repudiation, bring the contract to an end and sue for damages, Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term. But that is not the situation in the present case, where in my view the appellants elected that the contract should continue in force.

Where the contract has been affirmed by the innocent party at first sight the position is simple. You must either affirm the whole contract or rescind the whole contract, you cannot approbate and reprobate by affirming part of it and disaffirming the rest — that would be making a new contract. So the clause excluding liability must continue to apply. But that is too simple and there is authority for two quite different ways of holding that, inspite of affirmation of the contract as a whole by the innocent party, the guilty party may not be entitled to rely on a clause in it. One way depends on construction of the clause. The other way depends on the existence of a rule of substantive law."

Lord Hodson in the same case said (at page 410):

"Sometimes it has been declared that where a fundamental breach of contract had occurred an exception clause could not as a matter of law be relied upon, but the better view on the authorities, and that accepted by both sides before your Lordships, is that as a matter of construction normally an exception or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract."

The arbitrator in my view has not misstated the law.

It is clear that clause 32(b) of the contract is an exceptions clause; it was inserted solely for the protection of the P.W.D.

The arbitrator is right in his finding that "there was no waiver of the fundamental breach or estoppel, or affirmation of the contract, by reason of the claimant having struggled on as long as he could in the face of all the difficulties."

It is submitted that, even assuming that there were serious breaches on the part of the P.W.D., the claimant was not right in walking off the site. The least that she should have done would have been to serve a notice on the respondent giving the respondent reasonable time in which to remedy whatever breaches she alleged against the respondent. Now, nowhere in the Notice of Motion was this complaint made and the respondent cannot now raise it.

The next point taken by the respondent is that the arbitrator has misconducted himself. The respondent says that the arbitrator had been requested by the respondent to state a case and the arbitrator had told the parties that he would consider that request. But before communicating his decision on the respondent's request the arbitrator published his award and thereby prevented the respondent from applying to the court to order a special case.

It is clear that the arbitrator did not rule that he would state his award as a special case under section 28. He ruled that he would state his award as a special case if it appeared desirable to him in the course of the reference. In fact on June 28, 1976, the arbitrator wrote to the respondent saying, *inter alia*, that in the exercise of his discretion he proposed to find the facts and apply the law to the facts leaving whichever party may who wish to do so to apply to the court in the usual way; that there was no agreement between the parties that the award should be in the form of a special case under section 28 and that it was his intention to give a reasoned award.

There is no substance in this complaint of the respondent.

In the result this motion fails and is dismissed with costs.

Motion dismissed.

Solicitors: *Murphy & Dunbar.*

SINGAPORE GOVERNMENT OFFICERS' CO-OPERATIVE HOUSING SOCIETY LTD. v. ACHUTHA MENON*

[A.C.J. (Choor Singh J.) October 3, 1978]
[Singapore — District Court Appeal No. 39 of 1977]

Co-operative Society — Deposit of moneys made by member — Deposit made for purchase of house and con-

* Reversed by C.A. on 15-1-79.

tributions — Failure of Society to develop houses — Claim for refund of deposit and contributions on member resigning from Society — Refusal of Society to refund despite admission of liability — Society claiming that there was a "dispute" and matter should be referred to arbitration — Co-operative Societies Act (Cap. 186), s. 49(1) and By-Laws of Society.

The appellant is a co-operative society registered under the Co-operative Societies Act. The respondent became a member of the appellant society in January 1968. On April 23, 1971 the respondent made a deposit of $2,300 to the appellant society for the purchase of a house at a co-operative garden which the appellant society was going to develop but which the society was unable to do for various reasons. The respondent also made contributions to the appellant society from time to time which totalled $1,314.74. As the appellant failed to build the houses at the co-operative garden, the respondent resigned from the appellant society on January 26, 1976 and demanded a refund of the moneys which he had deposited with the society totalling $3,614.74. The appellant society refused to pay the respondent the amount due although by letter dated November 23 1976 the appellant society admitted his claim. The respondent then took out a summons in the District Court against the appellant society claiming the said sum. The appellant society made an application to the District Court by way of notice of application for an order that the said summons be set aside or dismissed. The District Court dismissed the application with costs. The appellant society appealed against the Order of the District Court.

At the hearing of the appeal, counsel for the appellant society submitted that (a) there was a "dispute" in this case between the respondent and the appellant society "touching the business" of the society as envisaged by section 49(1) of the Co-operative Societies Act and rule 48 of the By-Laws of the Society and accordingly the matter should be referred to the Registrar of Societies for arbitration, and (b) the respondent was No. 2375 on the Waiting List as prepared by the appellant society and that the respondent had to wait his turn for payment. Counsel for the respondent submitted that there was no real dispute at all as the claim was admitted and that it was unreasonable for the respondent to wait for an indefinite period for moneys that were due to him.

Held: (1) there was no factual dispute between the parties in this case. Both liability and quantum had been admitted by the appellant society. There was here a deliberate and wilful refusal to pay the respondent the moneys that were admitted to be due and payable to him and there was nothing which called for arbitration by the Registrar of Societies:

(2) the appellant society should not be allowed to shelter behind the facade of a sham dispute in order to oust the jurisdiction of the court. It is the duty of the court to brush aside such false facades and look at the truth of the matter;

(3) section 49(1) of the Act specifically provides that a claim by a Society for any debt due to it from a member shall be deemed to be a dispute "touching the business" of the Society within the meaning of that sub-section. There was no corresponding provision regarding a claim by a member of any debt due to him from the Society. It was fair inference therefore that the legislature had no intention of excluding such a claim or demand by a member. It followed, therefore, that a member was free to take his claim to court when the claim was admitted but not met by the Society;

(4) a co-operative society cannot unilaterally impose conditions on a member which was not part of the contract when the member deposited his money with the society. It was totally wrong and unlawful on the part of the appellant society to unilaterally impose conditions for the refund of the moneys to the respondent in this case.

DISTRICT COURT APPEAL.

S. Gunaseelan for the appellant.

T.P.B. Menon for the respondent.

Choor Singh J.: This was an appeal against the order of a district court dismissing the defendants' application for an order to dismiss District Court Summons No. 5993 of 1976 in which the plaintiff claimed $3,614.74 from the defendants.

The facts are these. The defendant is a co-operative society registered under the Co-operative Societies Act (Chapter 186). It was incorporated with the object of assisting its members to own their own houses. The Society receives deposits of money from time to time from its members who intend to purchase houses from the Society. The plaintiff became a member of the Society on January 24, 1968. On April 23, 1971 he made a deposit with the Society of $2,300 for the purchase of a house at a co-operative garden which the Society was going to develop but later for various reasons it was unable to do so. The plaintiff also made contributions from time to time which totalled $1,314.74.

As the Society failed to build houses at the co-operative garden the plaintiff resigned from the Society on January 26, 1976 and demanded a refund of the moneys which he had deposited with the Society which then totalled $3,614.74. The Society refused to pay the plaintiff the amount due to him although by letter dated November 23, 1976 it admitted his claim. The plaintiff then took out a summons in the district court against the Society claiming the said sum. The Society made an application to the district court by way of notice of application for an order that the said summons be set aside or dismissed. The district court dismissed the said application with costs. The Society appealed against the said order of dismissal.

At the hearing of the appeal before me counsel for the Society explained that as a result of an acute shortage of funds caused by an act of criminal breach of trust by one of its employees and some other heavy financial losses suffered by the Society it was unable to refund the moneys due to the members who had resigned. The Committee of the Society has, pursuant to the power vested in it by the provisions of Rule 26(14) of the Society's By Laws, decided on a scheme for refunding to its past members their deposits. He stated that pursuant to the said scheme past members are being paid according to an ordinary list and a priority list which are drawn up in the order in which they resigned. Therefore counsel stated that the Society maintains that it will only pay to the plaintiff when his turn arises for receiving payment according to the waiting list drawn up for refunding deposits to those past members.

Counsel contended that there was accordingly a dispute in this case between the plaintiff and the Society "touching the business" of the Society as envisaged in section 49(1) of the Co-operative Societies Act (Cap. 186) and Rule 48 of the Society's By Laws. Section 49(1) provides that "if any dispute touching the business of a registered society" arises between a member or a past member and the Society or its Committee "such dispute shall be referred to the Registrar for decision". Rule 48 of the Society's By Laws contains in substance similar provisions.

Apart from requiring that the dispute should be one "touching the business of a registered society" neither the Act nor the Society's by Laws define the word "dispute" which therefore must be given its

ordinary meaning. Counsel for the Society contended that as the Society refused to pay the amount due to the plaintiff there was a dispute between the plaintiff and the Society "touching the business" of the Society and the said dispute must be referred to the Registrar for decision under section 49(1) of the Act which excludes the jurisdiction of the civil courts. Counsel submitted that the learned District Judge was wrong in disallowing the Society's application and that he should have dismissed the plaintiff's summons or stayed action on it.

Counsel for the plaintiff submitted that there was no real dispute at all as the Society had admitted the amount claimed by the plaintiff. The plaintiff was No. 2375 on the waiting list prepared by the Society and he will have to wait for a very long indefinite period for his money which was most unreasonable. The Society had no power to postpone repayment for an indefinite period. Counsel contended that if the Society's contention is right, then, whether or not there is a dispute in a case depends entirely on the financial position of the Society at the time when a claim is made. This could not have been the intention of the legislature when it enacted section 49(1) of the Act. Counsel submitted that there was no dispute within the meaning of section 49(1) of the Act and the plaintiff was entitled to judgment for the amount claimed as the claim was admitted. If the Society desired time for repayment, they could negotiate terms of repayment with the plaintiff after judgment had been entered against the Society.

The main issue in this case is whether or not there is a dispute between the parties within the meaning of section 49(1) of the Co-operative Societies Act which provides as follows: —

"49.—(1) If any dispute touching the business of a registered society arises —

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past member or person claiming through a member, past member or deceased member, and the society, its committee or any officer of the society; or

(c) between the society or its committee and any officer of the society; or

(d) between the society and any other registered society,

such dispute shall be referred to the Registrar for decision.

A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, shall be deemed to be a dispute touching the business of the society within the meaning of this subsection."

It will be seen that subsection (1) of section 49 of the Act specifically provides that a claim by a society for any debt due to it from a member shall be deemed to be a dispute touching the business of the society within the meaning of that subsection. There is no corresponding provision regarding a claim by a member for any debt due to him from the Society. It is a fair inference that the legislature had no intention of including such a claim or demand by a member within the ambit of a dispute touching the business of the society. Had the legislature intended that a claim by a member for a debt due to him from the society should be deemed to be a dispute touching the business of the society within the meaning of that subsection, the legislature would have so enacted. It follows therefore that a member is free to take his claim to court when it is admitted but not met by the society, because as a matter of law there is in those circumstances no dispute within the meaning of subsection (1) of section 49 of the Act.

There is also no factual dispute between the parties in this case. Both liability and quantum are admitted by the Society. Where is the dispute? What is it that is disputed? There is here a deliberate wilful refusal to pay the plaintiff what is admitted to be due and payable to him and there is nothing which calls for arbitration. The Society is endeavouring to shelter behind the facade of a sham dispute in order to oust the jurisdiction of the court. In my opinion it is utter nonsense to suggest that there is a *bona fide* dispute which requires arbitration. It is the duty of the court to brush aside such false facades and look at the truth of the matter. The Society cannot invoke section 49(1) of the Act in support of a dispute which does not exist. For the application of section 49(1) of the Act there must exist a *bona fide* dispute between the parties either as to liability or as to the quantum of the claim and it is only then that such a dispute is required to be referred to the Registrar of Co-operative Societies for the purposes of arbitration.

A co-operative society cannot unilaterally impose conditions on a member which were not part of the contract when the member deposited his money with the Society. In this case had the Society made it clear to the member when he deposited his money that in the event of his deposit becoming refundable, it will be refunded to him at the will and convenience of the Society, the member may not have made a deposit at all. In my opinion it is totally wrong and unlawful on the part of the Society to unilaterally impose conditions for the refund of the deposit to the member in this case.

In my judgment it is the duty of a co-operative society to so conduct its affairs that when a member resigns from the society he receives his dues within a short time. In this case the plaintiff deposited his money with the Society in 1971. That is eight years ago. He resigned from the Society in January 1976. That is 2½ years ago. There is no assurance at all from the Society as to when he will be paid the money due to him. He may not be paid for another ten years or even twenty years.

It is time that this Society puts its affairs in order. It should either raise a loan on the strength of its assets or dispose off some of its assets and pay the members who have resigned. If the Society is insolvent then it should wind-up. It is not only ridiculous but also unlawful for it to tell a member who has resigned that he will be paid his dues when it suits the Society.

In my judgment, the respondent's claim having been admitted by the Society, he was entitled to judgment against the Society for the amount claimed. The learned District Judge had therefore very rightly dismissed the Society's application for the dismissal of the summons issued against the Society.

Appeal dismissed.

Solicitors: *S. Gunaseelan; Oehlers & Choa.*